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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND MINNESOTA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Constitution. The Minnesota Civil Liberties Union is one of its state affiliates. Since its founding more than 70 years ago, the ACLU has participated in dozens of free speech cases before this Court, either as counsel for one of the litigants or as *amicus curiae*.

This case raises free speech concerns of vital importance. Law enforcement officials around the nation have increasingly relied on RICO and RICO-type statutes to seize and suppress expressive material that is presumptively entitled to constitutional protection. As dramatically illustrated by the government's wholesale destruction of such material during pendency of the appeal in this case, expansive use of RICO forfeiture in the First Amendment context, if allowed by the Court, will result in the destruction and suppression of much constitutionally protected material. In the interests of members of the public who would otherwise have access to such materials, the ACLU respectfully submits this brief *amicus curiae*.

BACKGROUND

This case arises from an episode in the Justice Department's campaign to suppress erotic speech, an effort geared to eliminate not only materials found obscene under the three-part test set forth in *Miller v. California*, 413 U.S. 15 (1973), but constitutionally protected literature and films on sexual themes as well.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3.

The Forfeiture at Issue Here

The prosecution in this case obtained convictions based on the transportation and distribution of seven obscene items, four magazines and three videotapes, while at the same time the jury found that six other challenged items constituted protected speech. Having obtained these convictions under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the government then used RICO's automatic forfeiture provisions to seize petitioner's entire chain of retail bookstores and video stores and his wholesale distribution business, including the entire inventory of presumptively protected books, magazines, and videotapes. After trial, but prior to completion of the appellate process, the government destroyed most of the inventory.

Much of this inventory consisted of items similar to both those the jury found to be non-obscene protected speech and the thousands of books and films that petitioner had sold for years apparently without offending community standards. Nevertheless, upon a finding that petitioner had "engage[d] in the conduct" of an "enterprise" -- *i.e.*, his chain of stores -- "through a pattern of racketeering activity" -- *i.e.*, selling seven obscene items -- the district court ordered forfeiture of petitioner's entire interest in ten stores. The district court acted pursuant to 18 U.S.C. § 1963(a)(2), which requires forfeiture of "any (A) interest in . . . or (D) property or contractual right of any kind affording a source of influence over; any enterprise" affected by the pattern of racketeering.

The court then proceeded to order forfeiture of several additional bookstores, other business and personal assets, and $8,910,548.10 in cash, bringing the total value of the property forfeited to an estimated $25 million. The forfeiture was ordered even though there was no evidence presented to the jury nor any finding made by the court concerning the respective portions of the business devoted to the illegal distribution of obscenity and to the dissemination of protected

expression. The court based this additional forfeiture on both 18 U.S.C. § 1963(a)(3), reaching "proceeds" of racketeering, and § 1963(a)(1), covering property "acquired or maintained" in violation of RICO.[2]

While the petition for rehearing was still pending before the Eighth Circuit, the vast majority of this expressive material -- "three tons of magazines, videotapes and sexual paraphernalia" -- was carted to a garbage processing plant and destroyed. *See* Steve Brandt, *Confiscated Stimulant is a Blast*

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[2] Both the district court and the Eighth Circuit, in ostensibly enforcing "proceeds" forfeiture, relied upon an erroneous reading of cases holding that the government need not trace the "identical dollars" that the defendant realized from illegal activity. *See United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Both courts overlooked that the government nevertheless must prove the amount illegally acquired, and demonstrate at least a rough correlation to the amount forfeited, *id.*, a burden wholly unmet in this case. It appears that the district court's actual reason for ordering the additional forfeiture was to eliminate petitioner's ability to continue distributing pornography, in service of RICO's purpose of dismantling the corrupt enterprise "root and branch." *See United States v. Alexander*, No. 4-89-85, 1990 U.S. Dist. LEXIS 10466, at *18 (D. Minn. Aug. 10, 1990).

The government, the district court, and the Court of Appeals have all voiced concern that RICO forfeiture in obscenity cases is necessary to prevent use of expressive enterprises as vehicles for money-laundering, relying upon the Fourth Circuit's reasoning in *United States v. Pryba*, 900 F.2d 748, 755 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990), that "to follow the [prior restraint] argument would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations." On this record, however, that concern is misplaced. Whether and to what extent the forfeiture of protected speech might be justified by the government's interest in preventing money-laundering, this interest cannot justify wholesale forfeiture of materials not derived from ill-gotten gains. We therefore do not address the constitutionality of properly circumscribed forfeiture under § 1963(a)(3) reaching only actual "proceeds" of specific obscenity violations, which would present different issues than the broad-brush forfeiture actually imposed here.

in the Trash, Minn. Star Trib., Oct. 19, 1991, at 1B (*cited in* Petition for a Writ of Certiorari at 8). The only notice given of the government's plan to destroy these materials was a statement of intent to "dispose of the property in such manner as the Attorney General may direct" and "in accordance with law." Minn. Star Trib., Aug. 19, 1990, at 2N. Had it not been for an unexpected explosion as the "24 anvil-shaped hammers that weigh 170 pounds each and spin at 900 revolutions a minute," Brandt, *supra*, were crushing defendant's inventory, the public would never have become aware of the destruction.

The Government's Campaign to Eradicate Sexually-Oriented Speech

The extraordinarily harsh and disproportionate forfeiture imposed in this case was not an isolated instance of prosecutorial overzealousness, but part of a government plan to suppress a wide range of constitutionally protected, sexually-oriented speech. This plan was formulated in the late 1980s with the creation of a special "National Obscenity Enforcement Unit" ("NOEU") within the Department of Justice.

Some of the history of this campaign is recounted in the recent decision in *United States v. P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992). In 1985, the then-United States Attorney for Utah, Brent Ward, wrote to then-Attorney General Edwin Meese to propose "a coordinated, nationwide prosecution strategy against companies that sold obscene materials." *Id.* at 850. Ward urged Meese to create a "'strike force'" that could institute multiple successive or simultaneous prosecutions against major distributors of sexually-oriented films and literature, a strategy that would "'deal a serious blow to the pornography industry'" because it "'would test the limits of pornographers' endurance'" and might lead "'the targeted companies'" to "'curtail their operations and withdraw from

and refrain from entering [certain] markets.'" *Id.* (quoting letter).

In July 1986, the Attorney General's Commission on Pornography (the "Meese Commission") issued its Final Report. The Commission similarly called upon the Attorney General to "create a task force under the direction of a high ranking official, of no less stature than a Deputy Assistant Attorney General, to investigate and prosecute obscenity law violations" and to "attack the obscenity problem in a concerted and organized manner." Attorney General's Commission on Pornography, *Final Report* at 509 (July 1986). The Commission urged aggressive use of available remedies, "particularly those laws providing forfeitures that could literally put many pornographers out of business," *id.* at 464, and further advised: "Forfeiture should be used to uproot the capital of pornography producers and distributors. Used effectively, forfeiture can substantially handicap these businesses." *Id.* at 498.

The Commission recognized that perhaps prosecutors' most effective weapons could be "the stringent forfeiture provisions under RICO," which had recently been amended to apply to obscenity and thus could be used to "virtually eliminate a large scale pornography operation." *Id.* at 519. While the Meese Commission professed to be urging prosecution only with respect to material meeting the legal definition of obscenity, it defined "pornography" to refer to all material that is "predominantly sexually-explicit and intended primarily for the purpose of sexual arousal," *id.* at 229, a definition that encompasses much constitutionally protected expression.[3]

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[3] The Meese Commission expressed concerns even with respect to sexually explicit material that was neither violent nor degrading, *id.* at 339 (observing that "it is far from implausible to hypothesize that material depicting sexual activity without marriage, love, commitment, or affection

(continued...)

In response to these recommendations, on February 10, 1987, Attorney General Meese created the NOEU, "a special task force within the United States Department of Justice whose mission [is] to spearhead and coordinate the federal government's efforts in the areas of obscenity and child pornography." *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15, 19 (D.D.C. 1990). Shortly thereafter, the Department of Justice abandoned its long-standing policy of discouraging multiple prosecutions in two or more districts against a single offender, and actually began encouraging such tactics "'where the size of the [defendant's] organizational structure suggests that a multiple district prosecution approach . . . will be most effective.'" 9 *Dep't of Justice Manual* § 9-75.310 (October 1, 1988), *quoted in PHE, Inc.*, 743 F. Supp. at 19. The Department's prosecutor's manual had to be specifically altered for this purpose. *Id.* Thus, although due process forbids government from attempting "'to wear [defendants] out by a multitude of cases with accumulated trials,'" *Hoag v. New Jersey*, 356 U.S. 464, 467 (1958) (citation omitted), the government adopted precisely such a strategy. *United States v. PHE, Inc.*, 965 F.2d at 850.

The prosecutions launched under this new regime demonstrate that the government's purpose is not just to suppress obscenity, but to drive out of the marketplace anyone who

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[3](...continued)
bears some causal relationship to sexual activity without marriage, love, commitment, or affection"), as well as certain works involving mere nudity. *Id.* at 347-48.

Before issuing its Final Report, the Commission also wrote to businesses selling *Playboy* and *Penthouse* magazines to inform them that "the Commission received testimony alleging that your company is involved in the sale or distribution of pornography" and offering those companies the opportunity "to respond to the allegations" prior to the issuance of the Final Report. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 588 app. A (D.D.C. 1986).

distributes sexually-oriented materials. In *PHE, Inc.*, the district court enjoined the Department of Justice, the NOEU, and other federal prosecutors from bringing multiple indictments, on the basis of plaintiffs' showing of "a substantial likelihood of success on the merits of their claim that defendants' conduct constitutes bad faith calculated to suppress plaintiffs' constitutional rights." 743 F. Supp. at 25. The court based this conclusion on uncontested findings that (1) government prosecutors had harassed plaintiffs' employees; (2) prosecutors had threatened plaintiffs with multi-district federal prosecution unless they agreed "to cease distribution of all sexually-oriented expressive materials nationwide" including "films, magazines, or books containing 'mere nudity' as well as *Playboy* and *Penthouse* magazines and the book *The Joy of Sex*"; (3) prosecutors had acknowledged that they were requiring plaintiffs to "surrender their First Amendment rights"; and (4) prosecutors had expressly stated that to avoid prosecution plaintiffs would have to "discontinue entirely their participation in the business of sexually-oriented visual material, without regard to whether the material was protected by the First Amendment," because "the prosecutors wanted [PHE's principal] 'out of the business.'" *Id.* at 18.[4]

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[4] The same undisputed facts served as the basis for the Tenth Circuit's recent decision that PHE had satisfied its burden of showing that a federal indictment subsequently brought against it in Utah was "the tainted fruit of a prosecutorial attempt to curtail [its] future First Amendment protected speech." 965 F.2d at 860. *See also Freedberg v. United States Dep't of Justice*, 703 F. Supp. 107, 109-13 (D.D.C. 1988) (federal prosecutors enjoined from launching multiple prosecutions confronting distributor of sexually-oriented materials with "annihilation, by attrition if not conviction").

The prosecution of petitioner in this case thus should be viewed in the broader context of the federal government's crusade against sexually explicit speech. No federal RICO obscenity indictment may be brought without the consultation and involvement of the NOEU, whose prosecutors have actively trained and assisted local federal prosecutors in this area. 9 *Department of Justice Manual* § 9-75.001 (1989). The government's tactics in seizing and destroying petitioner's inventory of constitutionally protected material while his appeal was pending is in keeping with the bad-faith techniques condemned in the *PHE* decisions.

Given this background, it is clear that the forfeiture imposed upon petitioner was not merely a content-neutral punishment for selling seven obscene books and videotapes. To the contrary, this prosecution was commenced to drive petitioner out of the business of selling sexually explicit material -- an improper purpose that itself renders the government's actions constitutionally suspect. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). As Justice O'Connor has observed: "If . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986).

SUMMARY OF ARGUMENT

The courts below improperly held that First Amendment standards are wholly inapplicable to RICO's remedies simply on the ground that the government has characterized those remedies as "punishment" for petitioner's "racketeering activity." The First Amendment cannot be avoided through the manipulation of labels. To the contrary, this Court has consistently recognized that the suppression of speech de-

mands constitutional scrutiny regardless of the labels that government attaches to its activity.

While the Court in *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989), upheld the constitutionality of using obscenity violations as the predicate acts for a RICO-style indictment, it explicitly reserved the question of the constitutionality of RICO's *remedies* in the speech context, *id.* at 60 -- remedies that are different not just in severity but in kind from ordinary criminal sanctions. As this case demonstrates, application of at least certain of RICO's forfeiture provisions in obscenity cases constitutes unconstitutional prior restraint of speech because: (1) the stated purpose of RICO is to incapacitate the offender from committing further violations, and as applied to obscenity RICO operates to allow the government to destroy existing speech materials and prevent future speech on the ground that it may be illegal; and (2) the forfeiture provisions inevitably lead to the direct and complete suppression of protected material.

The application of RICO forfeiture in the First Amendment context is further unconstitutional because of the vast discretion it gives prosecutors to determine whether to unleash RICO, with its incapacitating remedies, or to withhold that weapon because the defendant is a "legitimate" business. This exercise of prosecutorial discretion clearly is guided by the government's view of whether the defendant is otherwise engaged in undesirable, but protected, speech; this is the essence of impermissible censorship.

Finally, the government's destruction of petitioner's presumptively protected materials while the appeal was pending violated both the Constitution and the clear terms of the RICO statute. To treat such material as if it were contraband places the government in the intolerable role of unreviewable censor. The statute can and should be interpreted to avoid such constitutional problems: RICO requires that forfeited materials be disposed of in a "commercially feasible

manner" and with "due provision for the rights of any innocent persons." Simply destroying salable merchandise does not satisfy the "commercially feasible" requirement, and does not constitute due provision for the right of the innocent public to have prompt access to protected expression.

ARGUMENT

I. THE PROTECTIONS OF THE FIRST AMENDMENT MAY NOT BE CIRCUMVENTED BY RE-LABELING OBSCENITY REGULATION AS AN ATTACK ON "RACKETEERING"

Despite the obvious and severe impact of the government's actions in this case upon expressive activity, the Eighth Circuit upheld the application of RICO's draconian remedies as a permissible regulation of "racketeering." Through the use of the "racketeering" rubric, the Court of Appeals would permit what this Court has prohibited for more than half a century: the circumvention of basic First Amendment protections through use of semantic devices to bring laws restricting free speech under the mantle of neutral governmental regulation.

The Court of Appeals reasoned that since "the RICO forfeiture provisions constitute a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities," such forfeiture cannot raise First Amendment problems. *Alexander v. Thornburgh*, 943 F.2d 825, 834 (8th Cir. 1991), *cert. granted*, 112 S. Ct. 3024 (1992). This conclusion violates the Court's repeated directive that *all* regulation of speech-related activity, even when nominally directed at categories of "unprotected" speech, is subject to First Amendment scrutiny.[5]

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[5] The Court recently reaffirmed this principle in *R.A.V. v. City of St.* (continued...)

The Court of Appeals also ignored this Court's admonition that "in passing upon constitutional questions, the Court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931). In *Near*, the Court struck down a statute declaring publication of a "malicious, scandalous, and defamatory" periodical to be a nuisance, and providing for the permanent injunction of "such nuisance." *Id.* at 702-03. Despite Minnesota's argument that the injunction entered under the statute was simply a form of business regulation, this Court held that the law must be scrutinized for its impact on future protected speech. "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

Fifty-eight years later, the Court reaffirmed these principles in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), which held that "the State cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'" *Id.* at 67. The Court rejected Indiana's argument that its forfeiture provision, modeled on the federal RICO statute, could be justified "upon the neutral ground that the sequestered property represented assets used and acquired in the course of

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[5](...continued)
Paul, 112 S. Ct. 2538 (1992), which held that government may not apply content-based distinctions even within a category of "unprotected" speech. The Court stressed that language in prior cases suggesting that obscenity, libel, and other such categories are not protected by the First Amendment "must be taken in context" and "are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all,'" since no category of speech is "entirely invisible to the Constitution." *Id.* at 2543 (citation omitted). Here, of course, the forfeiture order was directed at presumptively protected speech that falls within the First Amendment under any analysis.

racketeering activity." *Id.* at 64. Without reaching the constitutional validity of the ultimate forfeiture remedies embodied in the Indiana statute, the Court held that the pre-conviction seizure of First Amendment materials was subject to constitutional scrutiny: "It is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint, and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here." *Id.* at 65.

Between *Near* and *Fort Wayne Books*, the Court frequently reaffirmed that labels will not avert First Amendment analysis. *See Fort Wayne Books*, 489 U.S. at 66-67 (citing cases demonstrating that "the way in which a restraint on speech is 'characterized' under State law is of little consequence"). For example, in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam), the Court struck down an obscenity injunction under a neutral-sounding "public nuisance" law for failure to provide constitutionally adequate procedures. The fight against racketeering, like the abatement of public nuisances, is a legitimate sphere for the exercise of governmental power. But as the Court held in *Fort Wayne Books*, when the exercise of that power touches areas of presumptively protected expression, the means employed must satisfy First Amendment concerns.

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), relied upon by the government and the courts below, actually supports the application of First Amendment analysis in the present case. In *Arcara*, the Court held that heightened First Amendment scrutiny was not required for a padlock sanction imposed upon a bookstore that had permitted prostitution and other illegal sexual activities on its premises. The Court distinguished cases in which the offenses triggering governmental restrictions themselves involved speech-related activity, stressing that "[t]he legislation providing the closure

sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707. The Court emphasized that the padlock order applied only to the "physical premises in which respondents happen to sell books," *id.*, and that "the order would impose no restraint at all on the dissemination of particular materials," since any material on the premises could be sold elsewhere. *Id.* at 706 n.2.

Here, by contrast, the Government applies the drastic remedies of RICO not to combat prostitution or other sexual conduct, nor to put a stop to drug-dealing, gun-running, or other crimes having no cognizable speech content, but to regulate presumptively protected speech. Moreover, the remedy is imposed not just against particular premises but directly against books and other materials presumptively within the First Amendment's protections. Following the distinctions drawn in *Arcara*, and applied in *Fort Wayne Books*, both the procedures and remedies of the RICO statute must be scrutinized under the First Amendment.

II. THE APPLICATION OF RICO'S BROAD "ENTERPRISE" FORFEITURE PROVISIONS TO SUPPRESS AND DESTROY BOOKS AND OTHER EXPRESSIVE MATERIALS VIOLATES THE FIRST AMENDMENT

The Court has repeatedly stressed that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (citations omitted). This principle is unquestionably pertinent in the enforcement of laws against obscenity. "[C]onstitutionally protected expression . . . is often

separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

RICO is hardly a sensitive tool. It is by design a blunt instrument, which by virtue of its enormous scope and severe penalties has often been criticized even where free speech concerns are not present.[6] As Justice Stevens observed of the essentially identical Indiana RICO statute, "[it] arms prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use. This the First Amendment will not tolerate." *Fort Wayne Books*, 489 U.S. at 85 (Stevens, J., concurring in part and dissenting in part).

A. The Post-Conviction Seizure of Petitioner's Entire Business, Including The Inventory of Presumptively Protected Material, Is An Unconstitutional Prior Restraint

The application of RICO forfeiture in obscenity cases such as this one permits the suppression of vast quantities of materials never adjudicated obscene, and therefore amounts to both the suppression of existing expression and a prior restraint of future protected speech. The wholesale suppression and destruction of materials that have not been found to be obscene or otherwise unprotected is unconstitutional. *Marcus v. Search Warrant*, 367 U.S. 717 (1961). And, of course, "[a]ny system of prior restraints of expression comes

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[6] *See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (Scalia, J., concurring) (criticizing RICO on vagueness grounds); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., dissenting) ("The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions . . . given the extremely severe penalties authorized by RICO's criminal provisions.").

to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70.

Under RICO, upon a finding that a defendant has engaged in a "pattern of racketeering activity" a court *must* order, *inter alia*, forfeiture of *all* property acquired or maintained in violation of RICO, and forfeiture of all interests, claims, and property or contractual rights that afford the defendant a source of influence over the enterprise through which the defendant sold or exhibited the obscene materials. 18 U.S.C. § 1963(a)(1) & (2) (together referred to herein as "enterprise" forfeiture). The effect of this provision is to permit prosecutors to run bookstores and movie theaters out of business, and to seize and destroy their assets, including unlimited quantities of expressive materials. Such actions are plainly unconstitutional under *Near v. Minnesota*, 283 U.S. 697 (1931), which held that the state could not ban future disapproved speech by a newspaper based upon a showing that it had engaged in scandalous speech in the past.[7]

The government has argued -- and the district court and Court of Appeals have held -- that this case differs from *Near* because the object of RICO forfeiture is not to restrain future speech but to punish the defendant for having broken the

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[7] Two courts have recently imposed limiting constructions upon forfeiture remedies for speech-related offenses that go beyond mere disgorgement of obscene materials and proceeds from unlawful activity, in order to avoid the constitutional problems noted here. *See Adult Video Ass'n v. Barr*, 960 F.2d 781, 790-92 (9th Cir. 1992) (holding that RICO does not permit forfeiture of "those assets or interests of the defendant invested in legitimate expressive activity"); *United States v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377, 1393-94 (N.D. Tex. 1991) (denying forfeiture beyond actual obscene materials upon conviction under 18 U.S.C. § 1467).

law.[8] But nothing in *Near* suggests that a state interest in punishment insulates what would otherwise be an unconstitutional prior restraint.

Properly understood, the challenged forfeiture order in this case reflects two of the principal vices of a prior restraint. First, a principal purpose of RICO is to incapacitate the defendant from committing future violations, which in the obscenity context has been taken by the government to include the prevention of future speech that the government thinks may be obscene. This suppressive purpose renders the forfeiture approved in this case an unconstitutional prior restraint.[9] Second, the forfeiture order was predicated on speech-related conduct, and, once implemented, completely suppressed petitioner's future speech even to the point of destroying presumptively protected expressive material. It thus qualifies as an unconstitutional prior restraint under each of the factors enunciated in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.2 (1986).

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[8] In *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Fourth Circuit adopted a different argument to distinguish *Near*. While apparently acknowledging the suppressive intent behind application of RICO forfeiture to obscenity, the court found *Near* inapposite for the unsupportable reason that newspapers, in the Fourth Circuit's view, are "more clearly protected by the First Amendment" than are adult bookstores. *Id.* at 754-55.

[9] Because the government plainly has a purpose of suppressing future speech in applying RICO here, the Court need not decide whether a suppressive purpose is *always* necessary for regulation to constitute an unconstitutional prior restraint.

1. The application of RICO forfeiture to speech materials is intended to prevent future speech that may be illegal by incapacitating the defendant from engaging in any future speech

The forfeiture provision of RICO "was intended to serve all the aims of the RICO statute, namely, to 'punish, deter, *incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.*'" *Russello v. United States*, 464 U.S. 16, 27-28 (1983) (quoting 116 Cong. Rec. at 18955 (1970) (remarks of Sen. McClellan)) (emphasis added). In other words, RICO forfeiture is intended to prevent recurrence of the "racketeering activity." *See also United States v. Perholtz*, 842 F.2d 343, 369 (D.C. Cir. 1988), *cert. denied*, 480 U.S. 821 (1988); H.R. Rep. No. 98-1030, 98th Cong., 2d Sess., 198 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3377 (RICO "was designed to deprive racketeers of the economic power generated by and used to sustain organized criminal activity"). In particular, the automatic enterprise forfeiture provisions of RICO, 18 U.S.C. § 1963(a)(1) and (2), are clearly tailored to the goal of *incapacitating*, rather than merely punishing, the defendant.

When applied to crimes or enterprises that have nothing to do with speech, this goal of incapacitation raises no First Amendment concerns. But employing the incapacitating effect of RICO forfeiture against violations of obscenity laws as predicate acts under RICO poses serious constitutional questions. As Justice Stevens observed in *Fort Wayne Books* (discussing the post-conviction forfeiture issue the majority declined to reach):

> A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment protection

> accorded the former does not apply either to the predicate offense or to the business use in the latter. Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment. Nor will use of [RICO] to rid that type of enterprise of illegal influence, even by closing it, engender suspicion of censorial motive. Prosecutors in such cases desire only to purge the organized-crime taint; they have no interest in deterring the sale of pizzas or hardware. Sexually explicit books and movies, however, are commodities the State does want to exterminate. The [Indiana RICO] scheme promotes such extermination through elimination of the very establishments where sexually explicit speech is disseminated.

489 U.S. at 85 (Stevens, J., concurring in part and dissenting in part).

The Justice Department's use of RICO to suppress even non-obscene sexually-oriented speech (*see* pp. 4 - 8, *supra*) makes this censorial purpose abundantly clear. But regardless of the motivation of any particular set of prosecutors, the purpose of preventing future racketeering activity -- here, obscenity -- by incapacitating the offender inheres in the structure of the statute itself. Preventing future speech that the state believes will or may turn out to be illegal, before it occurs and without individualized consideration of the suppressed material, is the essence of a prior restraint. RICO's application to obscenity thus suffers the same infirmity as the attempt of the state in *Near* to prevent future illegal speech through an injunction aimed at the more "'efficient repression or suppression of the evils of scandal,'" 283 U.S. at 77 (quoting trial court).

This result cannot be avoided by calling the forfeiture "punishment" any more than First Amendment scrutiny can be

circumvented by defining obscenity as "racketeering." Nor does it matter that the government may be able to express a genuine purpose of "punishing" those that it also seeks to suppress. The ability to do so cannot shield prior restraints from the "heavy presumption against . . . constitutional validity" that they bear. *Bantam Books*, 372 U.S. at 70. A contrary position would eviscerate the prior restraint doctrine, because it is always possible to characterize suppression as punishment. Virtually by definition, when government wishes to suppress an individual's expression it would also be pleased to see the individual punished for the past actions that have demonstrated a propensity for disfavored expression.[10]

2. Wholesale RICO forfeiture directly and completely suppresses future protected speech and is therefore unconstitutional

The seizure and subsequent burning of expressive material is an ancient and highly effective method of suppressing disfavored speech; distaste for such practices was a key element behind the framing of the First Amendment. *Marcus*, 367 U.S. at 724-29. As with the pre-trial seizure in *Marcus*, the government's actions in this case unconstitutionally impose "an effective restraint -- indeed the most effective restraint possible," *id.* at 736, of petitioner's right to speak and to choose to bear the risk of the punishment that may ensue should his speech later be adjudicated unprotected. In fact, the measures taken here are even more directly suppressive than those disapproved of in *Marcus*: There speech was only suppressed until its status was adjudicated, while here the

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[10] The Minneapolis officials who had been the object of Near's poison pen undoubtedly would have been pleased to see him punished for past calumnies in addition to being enjoined, but characterizing the injunction against future publishing as a punishment would not have altered the result of that case.

material has been irrevocably destroyed and no such adjudication will ever be possible.

By contrast with the measures of direct suppression consistently held unconstitutional, in *Arcara* the Court found that an order temporarily closing a single bookstore would not be a prior restraint for two reasons:

> First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited -- indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

474 U.S. at 706 n.2. Both factors dictate a finding of unconstitutional prior restraint here.

The forfeiture order proposed by the government, and approved by the district court, effectively drove petitioner from the bookselling business. Unlike the bookseller in *Arcara*, petitioner cannot take his books and tapes to another location for dissemination, because the *expressive material itself* has been destroyed. Thus, this is not a case where a speaker has been told he cannot speak in a particular time, place, or manner. This is a case where the speaker's words have been taken away from him.

In addition, it is impossible to say that the forfeiture ordered in this case "has nothing to do with any expressive conduct at all," *id.*, because the predicate offense justifying the forfeiture in the first place was speech-related. Moreover, as demonstrated above, the very purpose of the RICO remedial scheme is to prevent future "racketeering" -- in this

case, to prevent future speech that might or might not be illegal. Since the government achieved that purpose here by suppressing in advance *all* of petitioner's speech, it has imposed an unconstitutional prior restraint.

B. Application of RICO's Forfeiture Scheme to Expressive Activity Is Further Unconstitutional Because It Gives Prosecutors Unfettered Discretion to Suppress Disfavored Speech

At its core, the First Amendment commands that "Congress shall make no law" that endows government officials with the power to determine who may speak and what they may say. The Constitution instead favors a variety of discourse: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Thus, this Court has insisted that any law that "makes that peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

The availability of RICO's incapacitating enterprise forfeiture remedies for obscenity violations offends this principle by granting prosecutors the unfettered discretion to decide whether to press a RICO charge and dismantle an entire expressive enterprise -- presumably, as here, based on the judgment that even the defendant's protected speech activities are undesirable -- or whether to forgo RICO and pursue only simple obscenity charges.[11] The power of this

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[11] The grant of broad discretion to prosecutors in applying RICO in (continued...)

tool has been recognized by the Justice Department, which has centralized the discretionary authority in order to ensure conformity with the Department's program of suppressing sexually-oriented speech. (*See* p. 8, *supra*).

The "doctrine forbidding unbridled discretion," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988), has been elaborated under a number of different First Amendment categories. The Court has, for example, noted "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757.[12] Elsewhere, the Court has stressed that undue discretion is one of the primary evils characterizing vague laws, *see, e.g., Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732 (1991); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (invalidating criminal contempt penalty for "flag-misuse": "Statutory language of such a standardless sweep allows policemen [and] prosecutors . . . to pursue their personal predilections"), as well as overbroad laws:

> [A] penal statute . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press . . . readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.

Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (invalidating criminal penalty for "loitering").

A primary concern is that a law granting undue discretion to suppress speech renders it impossible to review government action for censorial motive. In *City of Lakewood*, for example, the Court discussed this concern in the context of a newsrack licensing scheme:

> [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.

486 U.S. at 758.

Here, the danger of unreviewable censorial motive is very real -- and, as demonstrated above (at pp. 4 - 8), not merely hypothetical. The government's easy ability to transform an obscenity prosecution into a RICO case[13] and to spread the

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[11](...continued)
general was quite deliberate: "[Congress] chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which its use was warranted." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 503 (Marshall, J., dissenting) (citing legislative history).

[12] Thus, although in certain limited circumstances a prior restraint may survive the "heavy presumption against its constitutionality," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), any scheme that places undue discretion in the hands of a government official "will not be tolerated." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (opinion of O'Connor, J.).

[13] Only two "predicate acts" of obscenity distribution are required to make out a RICO indictment. 18 U.S.C. § 1961(5). Although the acts must form a "pattern of racketeering," *see* 18 U.S.C. § 1962, the judge-made requisites of "relationship plus continuity" are so minimal and cryptic as to cause four Justices of this Court to suggest that this "meager (continued...)

book-burning flames from a tiny amount of obscene material to an unlimited quantity of protected speech is an invitation to prosecutions ostensibly predicated on a handful of obscene works but substantially motivated by the desire to suppress the protected works of unpopular speech or speakers, including the non-obscene sexually explicit material that has been targeted by the Justice Department. At a time when adult booksellers, rap musicians, performance artists, museum curators, and others whose works may test the limits of social acceptance are under attack in many communities, the ability of government to label a speaker a "racketeer" and on that basis to seize protected materials and prevent their dissemination is too ominous for the Constitution to allow.

If RICO were applied in an even-handed fashion to any enterprise purveying *any* amount of arguably obscene material, it would seem only a matter of time before a "pattern of racketeering activity" would be found by a jury based on as few as two sales of a controversial novel, risque film, or sexually explicit popular music recording. The sequel of forfeiture and destruction would automatically follow for all property affording a Time-Warner, a Tower Records, or a B. Dalton corporate entity a "source of influence" over its record label, film studio, or chain of retail outlets. And the vast amount of non-obscene speech thereby seized might well be burned and crushed, as in this case, before an appellate court even had the opportunity to hear the case.

The expected counter-argument -- that such a "parade of horribles" is unlikely to materialize because of prosecutorial discretion not to bring RICO charges against "legitimate" media businesses -- only focuses the constitutional problem.

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[13](...continued)
guidance bodes ill for the day when [a constitutional] challenge is presented." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (Scalia, J., concurring).

It is precisely this discretion to declare one purveyor a "legitimate" business to be prosecuted only for individual acts of obscenity and another a "pornographer" to be run out of business that offends the "doctrine forbidding unbridled discretion" by allowing government to act as a censor.

III. NEITHER RICO NOR THE FIRST AMENDMENT PERMITS THE GOVERNMENT, AS UNFETTERED CENSOR, TO BURN BOOKS AND CRUSH VIDEOTAPES THAT HAVE NOT BEEN JUDICIALLY DETERMINED TO BE OBSCENE

The suppressive motive behind petitioner's prosecution was further demonstrated, while this case was before the Eighth Circuit, by a government action that has happily become a rarity in this country: book-burning. But this case is a stark reminder that the burning of books, like wanton searches and seizures, "is not new" in the history of "suppression of objectionable publications." *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961). The government treated the forfeited expressive materials as if they were contraband despite this Court's declaration that even alleged obscenity may not be so treated. *See id.*, 367 U.S. at 730-31. As a result of this act of summary censorship, much expressive material -- possibly including all copies of some works -- will never reach the public. By burning and crushing the vast majority of petitioner's inventory, when virtually none of those materials had been adjudicated obscene and most were therefore presumptively protected speech, the government violated both the Constitution and the clear language of RICO.

When property is seized following a RICO forfeiture order, the Attorney General must "direct the disposition of the property by sale or other commercially feasible means, making due provision for the rights of any innocent persons." 18 U.S.C. § 1962(f). The government must also "publish notice of the [forfeiture] order and of its intent to dispose of

the property in such manner as the Attorney General may direct." 18 U.S.C. § 1963(l)(1). The pro forma notice provided in this case gave no indication that the government's intended "disposition" was destruction. (*See* p. 4, *supra*). Thus, no meaningful notice was provided to the public -- "innocent persons" whose right of access to protected speech was severely infringed by the government's unilateral action.

RICO does not permit the government to burn books not adjudicated obscene. Paying a garbage processing plant to destroy three tons of merchandise with demonstrated commercial value is not the "commercially feasible" disposition required by the statute. Assuming, *arguendo*, that RICO forfeiture was appropriate in this case, the government was under a statutory obligation to sell the materials.[14]

The government cannot escape its statutory duty by maintaining that sale of the inventory, though "commercially feasible," would be inappropriate because of the sexually explicit nature of the destroyed materials. There is no basis to argue that all of the destroyed materials were obscene, since the district court found that many items were similar in character to the six items found by the jury to be protected speech. And even if the government had believed that all the materials were obscene, it was constitutionally barred from acting on that belief without a prompt adjudication. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Nor can the book-burning be justified by the government's distaste for non-

[14] The newspaper article that reported the book-burning referred to the government's apparent excuse for this action -- a purported $5000 monthly fee for storing the forfeited materials. Brandt, *supra*. But such costs exist whenever seized property is maintained, and could be minimized through prompt "commercially feasible" sale.

obscene sexually-oriented speech. Nothing in RICO permits the government to treat such material as contraband.[15]

Moreover, such summary treatment constitutes unconstitutional censorship, indistinguishable from the censorship condemned by the Second Circuit in *United States v. Various Articles of Obscene Merchandise, Schedule No. 1769*, 600 F.2d 394 (2d Cir. 1979). In that case, the United States Customs Service intercepted allegedly obscene merchandise arriving by mail from overseas, then sent notices to each addressee advising that the United States had commenced an action for forfeiture and destruction of the merchandise, and advising of the procedure for contesting the action. Not surprisingly (since receipt of obscene materials would likely constitute a crime), the majority of the addressees failed to respond; the government then moved for entry of a default judgment allowing it to destroy the unclaimed merchandise. The Second Circuit found this procedure constitutionally defective, explaining in terms equally applicable to this case:

> The practical effect of such a procedure would be to permit the government's administrative seizure and subsequent destruction of books, magazines and films to become an unreviewed act of censorship. As a result, citizens could be prevented from receiving materials which the courts, given the opportunity, would find not obscene. This we will not allow.

[15] If there were any doubt as to whether the government's actions violated the plain language of RICO, the provisions Congress wrote concerning disposition of seized assets should be construed to avoid the constitutional problems discussed herein. *See, e.g., United States v. Thirty-Seven Photographs*, 402 U.S. 363, 371-72 (1971) (construing 19 U.S.C. § 1305, authorizing Customs Service seizure of allegedly obscene material, to require prompt adjudication of obscenity).

600 F.2d at 399-400. The only contrast between this case and *Schedule No. 1769* is that here the government knew that much of the material it consigned to the flames was non-obscene, yet did not inform any party of its intention to destroy the material, and thereby afforded no one the opportunity to object.[16]

In sum, once the government took it upon itself to become custodian of presumptively protected sexually-oriented speech, it assumed the further responsibility either to obtain a *prompt* adjudication of its alleged obscenity, as required by *Freedman*, or, failing that, to insure prompt dissemination. "[D]ue provision for the rights of any innocent persons" must include consideration for the right of the innocent public to access to protected expression, for the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citation omitted). If the government deems this to be a cumbersome, awkward, or untoward role, that is all the more reason why it should not have sought forfeiture of these expressive materials in the first instance.

[16] In an analogous procedural situation, the Fourth Circuit held it improper to stay pending appeal an order to release magazines found by the district court not to be obscene, stating:

> *Marcus v. Search Warrant* . . . and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) . . . emphasize that the determinative factor insofar as the validity of censorship procedures is concerned is whether or not adequate safeguards are provided to insure prompt dissemination of publications which have not been judicially determined to be obscene.

United States v. Reliable Sales Company, 376 F.2d 803, 805 (4th Cir. 1967).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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